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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

PHILONG HUYNH,
Petitioner,
v.
J. LIZARRAGA, Warden,
Respondent.

Civil No. 14-2452 BEN (RBB)

**ORDER DENYING IN FORMA
PAUPERIS APPLICATION AND
DISMISSING CASE WITHOUT
PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has not paid the \$5.00 filing fee and has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a letter this Court construes as a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a).

REQUEST TO PROCEED IN FORMA PAUPERIS

The request to proceed in forma pauperis is denied because Petitioner has not provided the Court with sufficient information to determine Petitioner’s financial status. A request to proceed in forma pauperis made by a state prisoner must include a certificate from the warden or other appropriate officer showing the amount of money or securities Petitioner has on account in the institution. Rule 3(a)(2), 28 U.S.C. foll. § 2254; Local Rule 3.2. Petitioner has failed to provide the Court with the required

1 Prison Certificate. (The proper Southern District in forma pauperis form, which includes
2 the required Prison Certificate, is attached for Petitioner's convenience.)

3 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

4 Further, habeas petitioners who wish to challenge either their state court
5 conviction or the length of their confinement in state prison, must first exhaust state
6 judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34
7 (1987). To exhaust state judicial remedies, a California state prisoner must present the
8 California Supreme Court with a fair opportunity to rule on the merits of every issue
9 raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481
10 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must
11 allege, in state court, how one or more of his or her federal rights have been violated.
12 The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: "If state courts
13 are to be given the opportunity to correct alleged violations of prisoners' federal rights,
14 they must surely be alerted to the fact that the prisoners are asserting claims under the
15 United States Constitution." *Id.* at 365-66 (emphasis added). For example, "[i]f a habeas
16 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or
17 her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must
18 say so, not only in federal court, but in state court." *Id.* at 366 (emphasis added).

19 Nowhere on the Petition does Petitioner allege that he raised his claims in the
20 California Supreme Court. In fact, he specifically indicates he did not seek review in the
21 California Supreme Court. (See Pet. at 5.) If Petitioner has raised his claims in the
22 California Supreme Court he must so specify. "The burden of proving that a claim has
23 been exhausted lies with the petitioner." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.
24 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*,
25 134 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir.
26 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

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1 Further, the Court cautions Petitioner that under the Antiterrorism and Effective
2 Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a
3 petition for a writ of habeas corpus by a person in custody pursuant to the judgment of
4 a State court. The limitation period shall run from the latest of:

5 (A) the date on which the judgment became final by the
6 conclusion of direct review or the expiration of the time for
seeking such review;

7 (B) the date on which the impediment to filing an
8 application created by State action in violation of the
9 Constitution or laws of the United States is removed, if the
applicant was prevented from filing by such State action;

10 (C) the date on which the constitutional right asserted
11 was initially recognized by the Supreme Court, if the right has
been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

12 (D) the date on which the factual predicate of the claim
13 or claims presented could have been discovered through the
exercise of due diligence.

14 28 U.S.C. § 2244(d)(1)(A)-(D) (West 2006).

15 The statute of limitations does not run while a properly filed state habeas corpus
16 petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006
17 (9th Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an
18 application is ‘properly filed’ when its delivery and acceptance [by the appropriate court
19 officer for placement into the record] are in compliance with the applicable laws and
20 rules governing filings.”). However, absent some other basis for tolling, the statute of
21 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533
22 U.S. 167, 181-82 (2001).

23 Rule 4 of the Rules Governing Section 2254 Cases provides for summary
24 dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any
25 exhibits annexed to it that the petitioner is not entitled to relief in the district court . . .”
26 Rule 4, 28 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is
27 not presently entitled to federal habeas relief because he has not alleged exhaustion of
28 state court remedies.

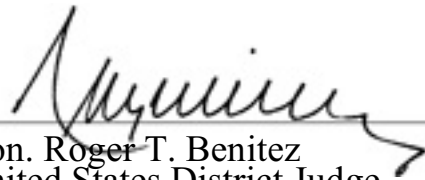
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CONCLUSION

Accordingly, the Court **DENIES** the request to proceed in forma pauperis, and **DISMISSES** the case without prejudice for failure to allege exhaustion of state judicial remedies. To have the case reopened, Petitioner must, **no later than December 16, 2014** (1) pay the \$5.00 filing fee or provide adequate proof of his inability to pay **and** (2) file a First Amended Petition which cures the pleading deficiencies outlined above. For Petitioner's convenience, the Clerk of Court shall attache to this Order, a blank First Amended Petition form and a blank In Forma Pauperis Application.

IT IS SO ORDERED.

DATED: October 22, 2014



Hon. Roger T. Benitez
United States District Judge